

SENATE NATURAL RESOURCES  
CLERK NO. 7  
DATE 1-19-07  
BILL NO. SB 248

Senate Bill 248  
January 19, 2007

Presented by Bob Lane, Chief Legal Counsel  
Senate Natural Resources and Energy Committee

Mr. Chairman and committee members, I am Bob Lane, Chief Legal Counsel with Montana Department of Fish, Wildlife & Parks (FWP).

SB 248 is the product of 15 years of negotiations between the State of Montana, represented by the Reserved Water Rights Compact Commission and the United States Forest Service. The Compact Commission exists, and these negotiations were pursued as an alternative to settling federal claims for reserved water rights through litigation. The negotiations were lengthy and certainly not without cost, but were far cheaper than a protracted court battle.

FWP has been interested and involved in the negotiations for many years. Naturally, we evaluated the agreement's potential to protect the waters of the state to support sustainable fisheries. The proposed compact does this in two ways. First, it immediately grants the Forest Service instream water rights on 76 streams for which data had been collected, mostly by FWP, and instream flow recommendations had already been made. Second, the compact establishes a process whereby the Forest Service has the opportunity to apply to the Department of Natural Resources and Conservation (DNRC) for additional instream flow reservation on streams flowing through Forest Service lands, by gathering data and quantifying those streams' instream flow needs.

FWP would support a process whereby the Compact Commission, or perhaps DNRC if the Compact Commission no longer exists, could agree to the use of other appropriate instream flow quantification methods geared toward establishing flows that support fisheries. We believe that appropriate methodologies must be scientifically defensible, that is they must have gone through a process of peer review.

The Compact Commission sunsets on July 1, 2009. Getting this compact finalized now would contribute significantly to the Compact Commissions' ability to focus on other negotiations and complete its work by that date. The instream flow rights that result will not only sustain vital fisheries, but will protect downstream water users who depend on water flowing from streams whose headwaters are on the National Forests.

## ARTICLE VI

### APPLICATIONS FOR STATE WATER RESERVATIONS UNDER STATE LAW

#### A. State Water Reservation.

The Forest Service may apply for a state water reservation to maintain a minimum flow, volume, level, or quality of water on National Forest System Lands under 85-2-316, MCA, in all basins within the State including basins or subbasins closed to new appropriations on or after the Effective Date of this Compact, subject to the terms of this Compact, for any purpose authorized by federal law applicable to National Forest System Lands. Any purpose authorized by federal law applicable to National Forest System Lands shall be considered a beneficial use under state law for the purposes of this Compact but shall set no precedent as to whether such purposes are beneficial uses under state law outside the terms of this Compact. A state water reservation issued under 85-2-316, MCA, is a Water Right Recognized Under State Law.

#### B. Specific Procedure in Limited Circumstances.

1. (a) For a state water reservation application pursuant to Article VI, section A., where the purpose of the reservation is to maintain a minimum flow for fish, and the amount requested is based on the Wetted Perimeter Methodology, a correct and complete application shall constitute:

(i) conclusive evidence of the purpose of the reservation;

(ii) conclusive evidence of the need for the reservation;

(iii) prima facie evidence that the amount requested is accurate and suitable:

(A) at the lower inflection point of the Wetted Perimeter Methodology; or

(B) at the upper inflection point of the Wetted Perimeter Methodology or other methodology adopted pursuant to Article VI, section B.1.(b), when the purpose of the reservation is for an existing population of bull trout, westslope cutthroat trout, Yellowstone cutthroat trout, Columbia River redband trout, arctic grayling, or any other fish species listed in the future under the Endangered Species Act, 16 U.S.C. § 1531, et seq.; and

(iv) prima facie evidence that the reservation is in the public interest.

Formatted: Indent: First line: 0"

(b) ~~By mutual agreement of the Parties, the Department may propose an administrative rule under the Montana Administrative Procedure Act, Title 2, chapter 4, of the Montana Code Annotated, to establish a methodology, other than the Wetted Perimeter Methodology, for an application for a state water reservation to maintain a minimum flow under Article VI, Section B.1.(a), for fish species identified in Article VI, Section B.1.(a)(iii)(B). Rulemaking under this subsection shall not be considered a modification of the Compact. The Department may adopt a rule under this subsection only if it finds, based on scientific and technical evidence in the administrative record, that:~~

Formatted: Strikethrough

- ~~(i) the proposed methodology enjoys acceptance in the scientific community as a methodology for establishment of minimum flow for pertinent fish species based on evidence that includes the existence of peer-reviewed studies, testimony or publications by experts in the field, and previous use in Montana or another relevant location; and~~
- ~~(ii) the results of the proposed methodology with respect to the stream that is the subject of the application are either based on field data collected with respect to the stream or susceptible to verification based on field data.~~

AMENDED SECTION B. 1. (b): For a state water reservation pursuant to Article VI, section A, where the purpose of the reservation is to maintain a volume, level, or quality of water on National Forest System Lands, and the amount of water requested is based on a peer-reviewed instream flow methodology, a correct and complete application shall constitute:

Formatted: Indent: Left: 0.21"

- (i)evidence of the purposes of the reservation;
- (ii)evidence of the need for the reservation;
- (iii) prima facie evidence that the amount requested is accurate and suitable to fulfill the purposes of the reservation; and
- (iv)prima facie evidence that the reservation is in the public interest.

Formatted: Indent: Left: 0.5"

Formatted: Indent: First line: 0.5"

Formatted: Indent: Left: 0.5"

Formatted: Indent: First line: 0.5"

2. For purposes of this Article VI, section B, ~~(1)~~ (a) a correct and complete application shall be substantially in the form attached hereto as Appendix 3. Appendix 3 may be modified at any time by the consent of both Parties and shall not be considered a modification of the Compact.

3. For the purposes of this Article VI, section B, the Department shall issue a state water reservation unless an objector proves by a preponderance of the evidence:

(a) that the amount of water under the Wetted Perimeter Methodology or other methodology adopted pursuant to Article VI, Section B.1.(b), was not accurately measured or calculated, that the Wetted Perimeter Methodology or other methodology adopted pursuant to Article VI, Section B.1.(b) could not suitably be applied to the

Deleted: ,

Deleted: For a state water reservation pursuant to Article VI, section A, where the purpose of the reservation is to maintain the ecological integrity of the riverine system, and the amount requested is based on a peer-reviewed instream flow methodology, a correct and complete application shall constitute:¶  
<#>evidence of the purposes of the reservation;¶  
<#>evidence of the need for the reservation;¶  
<#>prima facie evidence that the amount requested is accurate and suitable to fulfill the purposes of the reservation; and¶  
<#>prima facie evidence that the reservation is in the public interest. ¶  
37

stream reach applied for, or that there is not an existing population of the fish species set forth in Article VI, section B.1.(a)(iii)(B), identified in the application for state water reservation in the stream reach applied for; or, . . . .

[NO FURTHER PROPOSED AMENDMENTS TO ARTICLE VI].

#### New Section

#### Article VIII, Section J.

##### J. Due Diligence

The Parties agree to use all due diligence in implementing the terms of this Compact. The Parties also agree to negotiate a side agreement to this Compact by January 1, 2008, that sets out a reasonable pace of implementation, and identifies bench-marks for activities undertaken to achieve completion of the terms of the Compact. The Parties shall report to the Montana Legislature each term on their progress in implementing Article VI of the Compact. If there is an allegation in the legislative report by either Party of a failure to proceed with due diligence, then the Legislature shall appoint a neutral, independent investigator to report back to the Legislature regarding the allegation.